IN THE COURT OF CHANCERY OF THE STATE OF TENNESSEE
DAVIDSON COUNTY, PART ONE

IN RE INVESTIGATION OF:	)	
	)	
FESTIVA ADVENTURE CLUB,	)	
FESTIVA DEVELOPMENT GROUP, LLC,	)	
FESTIVA HOSPITALITY GROUP, INC.,	)	
FESTIVA REAL ESTATE HOLDINGS, LLC,	)	
FESTIVA RESORTS, LLC,	)	
FESTIVA RESORTSADVENTURE CLUB MEMBERS' ASSOCIATION, INC.,	)	**No. 13-1137-II**
FESTIVA TRAVEL & XCHANGE,	)	
FTX,	)	
PATTON HOSPITALITY MANAGEMENT, LLC,	)	
RESORT TRAVEL & XCHANGE, LLC,	)	
RTX,	)	
SETI MARKETING, INC.,	)	
ZEALANDIA CAPITAL, INC.,	)	
ZEALANDIA HOLDING COMPANY, INC.,	)	
DONALD K. CLAYTON,	)	
HERBERT H. PATRICK, JR., and	)	
RICHARD HARTNETT.	)	

STATE OF TENNESSEE'S RESPONSE AND OPPOSITION TO PETITION FOR PROTECTIVE ORDER

Respondent, State of Tennessee, by and through Robert E. Cooper Jr., Attorney General and Reporter ("Attorney General"), and on behalf of the Division of Consumer Affairs ("Division") of the Tennessee Department of Commerce and Insurance (collectively "State"), hereby responds to and opposes the Petition for Protective Order.

As grounds for its opposition, the State submits that Petitioners have failed to carry their burden of demonstrating "good cause" for protective relief as required by Tenn. Code Ann. § 47-18-106(b). Moreover, the Petition is devoid of supporting evidence or law, relying exclusively upon conclusory allegations of counsel.

Petitioners also misapprehend the applicable law and repeatedly confuse the standards applicable to the enforcement of judicial subpoenas in pending litigation with the standard applicable to administrative subpoenas. Petitioners further fail to disclose that the State made significant accommodations for Petitioners and proposed numerous modification, all of which Petitioners rejected. Petitioners further pretend they do not know what unlawful conduct is under investigation by the State, but as demonstrated below, Petitioners have been the subject of numerous complaints and investigations in many states, and have similarly evaded response and cooperation in those matters. In sum, Petitioners have no intention of responding to the State's investigative subpoenas and are simply continuing their established course of obstruction and delay.

For all of these reasons, as more fully set forth below, the Petition should be denied and all Petitioners should be ordered to immediately provide full responses to the State's four outstanding investigative subpoenas.

Introduction

From a reading of the Petition, one would not guess that Festiva is a timeshare seller. Instead, Festiva prefers to focuses attention away from this fact, and redirects attention to one of its products known as the "Festiva Adventure Club," just as it has done in its Petition before this Court.[1] As the State will be demonstrate below, Festiva sells many different products and its

[1] It is not surprising that Festiva does not want to identify itself as a timeshare seller. The timeshare industry has been riddled with problems for decades, and has received significant negative attention. *See, e.g.*, Alena Tugend, *When Giveaway Trips Come With Extra Baggage*, N.Y. Times, Jan. 14, 2011, http://www.nytimes.com/2011/01/15/your-money/15shortcuts.html; Lisa Ann Schreier, *Confessions of a Time-Share Salesperson*, CNN.com, (May 8, 2008), http://www.cnn.com/2007/TRAVEL/05/08/timeshare.salesperson/ (reprinted from BudgetTravelOnline); Chris Reiter, *Timeshare Trap: Some Check In But Can Never Get Out*, N.Y. Times, Feb. 1, 2008, http://www.nytimes.com/2008/02/01/business/worldbusiness/01iht-wbshare.1.9667331.html; Kevin Brass, *News Report Details the 'Pitfalls' of Investing in Timeshare Units*, N.Y. Times Raising the Roof Blog, (November 18, 2008),

Festiva Adventure Club product is really a quasi-timeshare product minus the consumer safeguards, transparency, and other benefits that traditional timeshares carry. The potential misconduct at issue concerns Festiva's business practices generally, not simply the misconduct associated with the Festiva Adventure Club, and the full scope of the misconduct under investigation in Tennessee and elsewhere is well known to Festiva; it has been a continual source of numerous consumer complaints, lawsuits, enforcement actions, and media exposés since at least 2006. Festiva's claims to the contrary are simply not credible.

The Tennessee Consumer Protection Act

The Tennessee Consumer Protection Act ("TCPA") was enacted to "protect consumers and legitimate business enterprises from those who engage in unfair or deceptive acts or practices in the conduct of any trade or commerce in part of wholly within this state." *See* Tenn. Code Ann. § 47-18-102(2). It is "remedial legislation necessary for the protection of consumers of the state of Tennessee and elsewhere," Tenn. Code Ann. § 47-18-115, and "shall be liberally construed" to promote its policies. Tenn. Code Ann. § 47-18-102. Likewise, liberal construction should be afforded to the interpretation and enforcement of consumer protection subpoenas. *See, e.g.*, *Harmon Law Office v. Attorney General*, 991 N.E.2d 1098, 1104 (Mass. App. Ct. 2013) ("Lastly, we observe that the Supreme judicial Court has stated that 'the statute should be construed liberally in favor of the government.") (*citing Matter of a Civil investigative Demand to Yankee Milk*, 362 N.E.2d 207, 214 (Mass. 1977)); *State v. Hobby Horse Ranch Tractor and Equipment Co.*, 929 P.2d 741, 743 (Idaho 1996) ("Therefore, the provisions of the CPA, including I.C. § 48-611, will be liberally

---

http://raisingtheroof.blogs.nytimes.com/2008/11/18/news-report-details-the-pitfalls-of-investing-in-timeshare-units/; Diane Henry, *Time-Share Industry Experiencing Growth Pains*, N.Y. Times, Sept. 27, 1981, http://www.nytimes.com/1981/09/27/realestate/time-share-resort-industry-experiencing-growth-pains.html.

construed to prevent deceptive or unfair trade practices, and to protect consumers."); *Benson v. People*, 703 P.2d 1274, 1278 (Colo. 1985) ("Section 18-17-108 adds that '[t]o effectuate the intent and purpose of this article, [its] provisions shall be liberally construed."); *Mobil Oil Corp. v. Killian*, 301 A.2d 562, 566 (Conn. Super Ct. 1973) ("The Connecticut statute must be interpreted liberally in view of all the circumstances, and so interpreted the description of the nature of the alleged offense here is sufficient compliance with the law.").

The TCPA authorizes the Division and Attorney General to investigate wrongdoing and to institute civil enforcement proceedings against wrongdoers. *See* Tenn. Code Ann. §§ 47-18-106-108. "As the chief law enforcement officer of the state, the [Tennessee] attorney general may exercise such authority as the public interest may require and may file suits necessary for the enforcement of state laws and public protection." *State v. Heath*, 806 S.W.2d 535, 537 (Tenn. 1991). To aid his consumer protection investigations, "the Attorney General is empowered to engage in extensive pre-complaint discovery if he has reasonable cause to believe that the investigated party has violated the Act." *People v. Herndon*, 581 P.2d 688, 688 (Ariz. 1978). Among other things, the Attorney General may, at the request of the Division, conduct investigations as set forth in Tenn. Code Ann. § 47-18-106.

The TCPA authorizes the Division and Attorney General to issue investigative subpoenas as follows:

> Whenever the Division has reason to believe that a person is engaging in, has engaged in, or, based upon information received from another law enforcement agency, is about to engage in any act or practice declared to be unlawful by this part, or has reason to believe it to be in the public interest to conduct an investigation to ascertain whether any person is engaging in, has engaged in, or is about to engage in such act or practice, the division upon the approval of the attorney general and reporter or through the office of the attorney general and reporter may:

(1) Require the person to file a statement or report in writing, under oath or otherwise, as to all the facts and circumstances concerning the alleged violation and to furnish and make available for examination whatever documentary material and information are relevant to the subject matter of the investigation;

(2) Examine under oath any person in connection with the alleged violation; and

(3) Examine any merchandise or any sample of merchandise deemed relevant to the subject matter of the investigation.

Tenn. Code Ann. § 47-18-106(a)(1).

I. Requests for Information May Seek Testimony Through Interrogatories

Absent any authority, Festiva first argues that the State's interrogatories are allegedly "not authorized" by statute because there is no explicit reference to the word "interrogatories" in Tenn. Code Ann. § 47-18-106(a). (Pet. 12) Festiva urges putting form before substance and makes a hyper-technical argument that is inconsistent with the TCPA's mandates of liberal construction. *See* Tenn. Code Ann. §§ 47-18-102, -115. As demonstrated below, Festiva argues a distinction without a difference.

The plain language of Tenn. Code Ann. § 47-18-106(a) makes clear that the State may compel sworn testimony in one of two ways: by requiring "a statement or report in writing, under oath or otherwise, as to all the facts and circumstances concerning the alleged violation . . . ," Tenn. Code Ann. § 47-18-106(a)(1), or by "examin[ation] under oath [of] any person in connection with the alleged violation," Tenn. Code Ann. § 47-18-106(b). Thus, the question here is whether there is any reason to conclude that interrogatories may not be used by the Attorney General in soliciting investigative information either as "written statements" under Tenn. Code Ann. § 47-18-106(a)(1), or as a form of "examination under oath" under Tenn. Code Ann. § 47-18-106(a)(2).

Court that have considered this argument under similar consumer protection statutes have rejected it.[2] For example, in *In re Attorney General's Investigative Demand to Malemed*, 493 A.2d 972 (Del. Super. Ct. 1985), the recipient of an attorney general's consumer protection subpoena argued that the attorney general was not authorized to issue written "interrogatories" because the statute did not refer to them. *See* 493 A.2d at 978. Like the Tennessee statute, the Delaware statute authorized the attorney general to require "a statement or report in writing under oath . . . ," *id.*, but made no explicit provision for written interrogatories. The court held that "it is clear that § 2514 also authorizes written interrogatories" because "[t]he interrogatories directed to petitioner require petitioners to do no more that '[f]ile ... statement[s] ... in writing under oath ... concerning the sale or advertising of merchandise' by petitioners, and therefore, are authorized by § 2514(1)." 493 A.2d at 978.

A similar argument was also considered and rejected by the Iowa Supreme Court in *State ex rel. Miller v. Smokers Warehouse Corp.*, 737 N.W.2d 107 (Iowa 2007). There, the defendant argued that the attorney general was not authorized to issue interrogatories and requests for documents because the Iowa consumer protection act did not authorize civil investigative demands, only subpoenas, and the subpoena provision did not explicitly authorize interrogatories and document requests. 737 N.W.2d at 109-10. Like the Tennessee statute, the Iowa statute does not contain a provision for interrogatories. *Compare* Tenn. Code Ann. § 47-18-106(b) *and* Iowa Code § 714.16(a)-(d).

The court disagreed with the defendant holding that while the statute did not actually use the term "civil investigative demand," it nevertheless authorized the attorney general to

[2] Courts have noted that interrogatories "provide an effective means of detecting false, fraudulent and sham claims and defenses which might otherwise be hidden behind evasive language in an adept pleading." *Deyo v. Kilbourne*, 84 Cal.App.3d 771, 779 (Cal. Ct. App. 1978).

issue subpoenas to "[r]equire such person to file on such forms as the attorney general may prescribe a statement or report in writing under oath or otherwise, as to all facts and circumstances concerning the sale or advertisement of merchandise . . . ." *Smokers Warehouse*, 737 N.W.2d at 110 (*citing* Iowa Code § 714.16). The court also held that Iowa's subpoena provision "in essence gives the Attorney General statutory authority to require the subject of an investigation to answer questions akin to civil interrogatories." 737 N.W.2d at 110.

The second provision in Tenn. Code Ann. § 47-18-106(a), which refers to an "[e]xamin[ation] under oath," is also consistent with the State's use of interrogatories here. Nothing in Tenn. Code Ann. § 47-18-106(2) restricts the Attorney General to "oral testimony" only; indeed, the statute simply refers to an examination under oath. If the General Assembly had wished to restrict this remedial legislation to oral testimony only, they would have said so. Instead, by referring to such investigative legislation in general terms, the General Assembly clearly left the form of examination to the Attorney General's discretion.

Moreover, traditional forms of "examination" in Tennessee have included "depositions upon oral examination," *see* Tenn. R. Civ. P. 30, as well as "depositions upon written questions," *see* Tenn. R. Civ. P. 31. Thus, nothing in Tenn. Code Ann. § 47-18-106(a) limits or restricts examinations under that section to oral examinations only, and Festiva's urging for a restrictive reading of this section cannot be sustained.

Festiva's argument that the State's interrogatories "not authorized" by statute also fails because if it were true, then in order to comply, the Attorney General would need to issue a lengthy question with subparts, weaving all the areas of inquiry he wished to cover into one big request, to require Festiva to "file a statement or report in writing, under oath

or otherwise, as to all the facts and circumstances concerning the alleged violation . . . ." Tenn. Code Ann. § 47-18-106(a)(1). Had the State done so here, Festiva would undoubtedly be before the Court today complaining about the nature of the compound and complex interrogatory served upon it by the State, requiring it to engage in a lengthy narrative report regarding its misconduct.

II. Document Requests Do Not Have To Be "Predicated on an Alleged Violation"

Festiva's arguments regarding the State's basis for its document requests also fail. Absent authority, Festiva argues that the State's document requests are not "appropriate" because they are "not properly predicted on an alleged violation." (Pet. 14) Festiva is claiming that some sort of "predicate violation" must be identified and articulated by the State before it can seek documents in a consumer protection investigation. The statute has no such requirement, and case law confirms that the State's Requests fully comply with the law.

As an initial matter, "[t]he burden of showing that the request is unreasonable is on the subpoenaed party." *FTC v. Texaco, Inc.*, 555 F.2d 862, 882 (D.C. Cir. 1977) (*citing United States v. Powell*, 379 U.S. 48, 58 (1964); *FTC v. Standard Am., Inc.*, 306 F.2d 231, 235 (3d Cir. 1962)). *See also FTC v. Boehringer Ingelhein Pharmaceuticals, Inc.*, 898 F. Supp.2d 171, 174 (D.D.C. 2012).[3] As demonstrated below, Festiva cannot meet its burden under the facts of this case or the law.

A presumption of regularity applies to the issuance of investigative subpoenas. *See Finnell v. United States Dep't of Justice*, 535 F. Supp. 410, 413 n.2 (D. Kansas 1982);

[3] Federal Trade Commission law is especially relevant here because the General Assembly has mandated that the TCPA "shall be interpreted and construed consistently with the interpretations given by the federal trade commission and the federal courts pursuant to § 5(A)(1) of the Federal Trade Commission Act." *See* Tenn. Code Ann. § 47-18-115.

Am. Pharm. Ass'n v. United States Dep't of Justice, 344 F. Supp. 9, 12 (E.D. Mich. 1971), *aff'd*, 467 F.2d 1290 (6th Cir. 1972). Moreover, "where, as here, the agency inquiry is authorized by law and the materials sought are relevant to the inquiry, that burden is not easily met." *FTC v. Rockefeller*, 591 F.2d 182, 190 (2d Cir. 1979) (*citing SEC v. Brigadoon Scotch Distributing Co.*, 480 F.2d 1047, 1056 (2d Cir. 1973)). *See also FTC v. Texaco, Inc.*, 555 F.2d at 882; *Genuine Parts v. FTC*, 445 F.2d 1382, 1391 (5th Cir. 1971); *Adams v. FTC*, 296 F.2d 861, 867 (8th Cir. 1961).

On its face, the State's Request to Festiva provides:

> The Division of Consumer Affairs of the Tennessee Department of Commerce and Insurance ("Division"), through Robert E. Cooper, Jr., Attorney General and Reporter ("Attorney General"), has reason to believe that it would be in the public interest to conduct an investigation, pursuant to the provisions of the Tennessee Consumer Protection Act, Tenn. Code Ann. § 47-18-106, to ascertain whether Festiva Adventure Club, Festiva Development Group, LLC, Festiva Hospitality Group, Inc., Festiva Real Estate Holdings, LLC, Festiva Resorts, LLC, Festiva Resorts Adventure Club Members' Association, Inc., Festiva Travel & Xchange, FTX, Patton Hospitality Management, LLC, Resort Travel & Xchange, LLC, RTX, SETI Marketing, Inc., Zealandia Capital, Inc., and Zealandia Holding Company, Inc. (collectively "FESTIVA"), are engaging in, have engaged in, or are about to engage in, acts or practices in whole or in part in Tennessee that are in violation of the Tennessee Consumer Protection Act of 1977, Tenn. Code Ann. § 47-18-101, *et seq.*

(Pet. Ex. A, Request to Festiva Entities, at 2) Similarly, the Requests sent to the Festiva Individuals provide:

> The Division of Consumer Affairs of the Tennessee Department of Commerce and Insurance ("Division"), through Robert E. Cooper, Jr., Attorney General and Reporter ("Attorney General"), has reason to believe that it would be in the public interest to conduct an investigation, pursuant to the provisions of the Tennessee Consumer Protection Act, Tenn. Code Ann. § 47-18-106, to ascertain whether Richard Hartnett is engaging in, has engaged in, or is about to engage in, acts or practices in whole or in part in Tennessee

> that are in violation of the Tennessee Consumer Protection Act of 1977, Tenn. Code Ann. § 47-18-101, *et seq.*, the Telemarketing Sales Rule, 16 C.F.R. Part 310, of the Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. § 6101, *et seq.*, and other laws.

(Pet. Exs. B-D, Requests to Festiva Individuals, at 1-2).

Thus, in the case of the Festiva Entities[4], the Request advises Festiva that the Division and the Attorney General have "reason to believe that it would be in the public interest to conduct an investigation, pursuant to . . . Tenn. Code Ann. § 47-18-106, to ascertain whether [the Festiva Entities] are engaging in, have engaged in, or are about to engage in, acts or practices in whole or in part in Tennessee that are in violation of the Tennessee Consumer Protection Act of 1977, Tenn. Code Ann. § 47-18-101, *et seq.*" Festiva is thus advised that the State's investigation is being conducted to determine whether Festiva has violated the TCPA.

Similarly, the Festiva Individuals are being advised that the Division and the Attorney General have "reason to believe that it would be in the public interest to conduct an investigation, pursuant to . . . Tenn. Code Ann. § 47-18-106, to ascertain whether [the Festiva Entities] are engaging in, have engaged in, or are about to engage in, acts or practices in whole or in part in Tennessee that are in violation of the Tennessee Consumer Protection Act of 1977, Tenn. Code Ann. § 47-18-101, *et seq.*, the Telemarketing Sales Rule, 16 C.F.R. Part 310, of the Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. § 6101, et seq., and other laws." The Festiva Individuals are also thus advised that the State's investigation is being conducted to determine whether they have violated the TCPA as well as certain federal telemarketing laws and regulations.

"The law is well settled that the boundaries of an FTC investigation may be drawn

---

[4] "Festiva Entities" includes all the entities identified in the caption above. "Festiva Individuals" includes Donald Clayton, Herbert Patrick, and Richard Hartnett.

'quite generally' . . . in large part because at the investigative stage of a proceeding, the FTC need only have a '*suspicion* that the law is being violated in some way.'" *FTC v. O'Connell Assoc., Inc.*, 828 F.Supp. 165, 171 (E.D.N.Y. 1993) (quoting . *FTC v Invention Submission Corp.*, 965 F.2d 1086, 1090 (D.C. Cir. 1992).

Adequate notice of a violation is given when a subpoena simply recites the statutory provisions that the agency believes have been violated. *See FTC v. Green*, 252 F.Supp. 153, 156 (S.D.N.Y. 1966) ("[C]ases have upheld statements of purpose which, as in the instant case, have recited the statutory provisions which the agency thinks may have been violated."). "The agency issuing the CID need not inform the subject of an investigation about any particular wrongful conduct." *FTC v National Claims Service, Inc.*, No. S 98-283 FCD DAD, 1999 WL 819640, at *2 (E.D. Cal. Feb. 9, 1999); *accord Alyeska Pipeline*, 836 F.2d at 477; *FTC v. O'Connell Assoc., Inc.*, 828 F.Supp. 165, 171 (E.D.N.Y. 1993).

Thus, in *FTC v. O'Connell Assoc., Inc.*,, the court found that a statement of whether unnamed consumer reporting agencies or others violated the FTC Act and Fair Credit Reporting Act provided sufficient notice of the CID's nature and scope. *See* 828 F.Supp. at 170. Similarly, in *Ajello v. Hartford Federal Savings and Loan Ass'n*, 347 A.2d 113 (Conn. Super Ct. 1975), the court rejected the defendant's assertion that the attorney general's subpoena failed to "state the nature of the alleged violation," because the issue is really whether "that statement in the subpoena is sufficient to meet the statutory requirement that the demand state 'the nature of the alleged violation.'" 347 A.2d at 119 (*quoting* Conn. Gen. Stat. § 35-42(b)(1)). The court noted that "the absence of such a statement as to conduct in the subpoena duces tecum under consideration is not a fatal defect," because the subpoena stated that "the investigation concerns activity prohibited by [Conn.] General Statutes §§ 35-

26, 35-27, and 35-28(d)." 347 A.2d at 119. The court concluded by noting that "federal courts have been wary of attempts to frustrate the investigative purposes of the more stringent federal act by attacks on the sufficiency of the statement of conduct alleged to be an antitrust violation," *id.*, and concluded by noting that the defendant was "very well informed of the nature of the alleged violation under investigation" due to the existence of another government agency investigation. 347 A.2d at 210. And in *Steele v. State*, 537 P.2d 782, 787 (Wash. 1975), the Washington Supreme Court upheld the attorney general's description that he is investigating "possible violations of RCW 19.86.020, having the following general subject matter; Unfair and deceptive practices in the operation of an employment agency.") Thus, it is clear that a short statement referring to the applicable law is legally sufficient in an attorney general's investigative subpoena.

Even if an investigative subpoena contains an insufficient description of unlawful conduct, it should not be set aside if the recipient of the subpoena has actual knowledge of the unlawful conduct. *Material Handling Inst., Inc. v. McLaren*, 426 F.2d 90, 92 (3d Cir. 1970), *Pet. of Gold Bond Stamp Co.*, 221 F.Supp. 391, 398 (D. Minn. 1963). Thus, the fact that the parties have repeatedly discussed Festiva's unlawful conduct, as evidenced by their correspondence and meetings, is legally sufficient for purposes of notifying Festiva of the conduct under investigation. *See, e.g.*, *Finnell* 535 F. Supp. at 412.

Here, the multistate group has had numerous discussions and meetings with Festiva in an effort to bring Festiva into compliance with the law. Festiva acknowledges as much:

> Among the areas of interest to various investigating states are: (a) sales and marketing practices undertaken by the Petitioner Entities; (b) availability of units at particular resorts during certain times of the year; (c) the sufficiency of Club inventory to satisfy member demand; (d) increasing maintenance fees; and (c) collection practices.

(Pet. 9-10) And while Festiva "pretends" that Tennessee is interested in four of these areas, *id*, by its own admissions Festiva has acknowledged that Tennessee has explicitly discussed with it at least four of the seven "areas" of concern" the states have brought to its attention regarding its business misconduct. *Id.*

Even if the Requests were deficient in not identifying the fact that Festiva's suspected violations of the law concerned the TCPA or federal telemarketing laws, Festiva has abundant knowledge of its unlawful conduct. The way Festiva tells it, Festiva has no idea what the State is investigating, nor why they are even under investigation. Festiva thus claims that it is unable to respond to the State's requests because the State has not told it what unlawful conduct is under investigation. Apart from the fact that the Requests are fairly straightforward and can easily be answered in any context, Festiva's argument is disingenuous because as demonstrated below; the State has explicitly identified the unlawful conduct of concern directly and through the multistate investigation.

On October 1, 2012, North Carolina, on behalf of the multistate group, sent an extensive written list of twenty-three violations (or "areas of concern" as Festiva prefers to call them) that would be included in any injunctive relief the states sought from Festiva:

> [T]hat Festiva Individuals Donald Clayton, Herbert H. Patrick, Jr., the Festiva defendants and their employees, agents, and representatives, those working in concert with defendants, and all successors and assigns are permanently enjoined from:
>
> 1. Soliciting consumers to attend sales presentations for one or more Festiva Products through the promise of a gift unless the gift is given at the presentation and the gift does not require monetary payment, does not have an expiration date, and does not have any other conditions or restrictions, including further action by the consumer, in order to use and enjoy the gift;

2. Soliciting consumers to attend sales presentations for one or more Festiva Products through the promise of a gift unless the price defendants paid for the gift or the actual retail value of the gift (the price at which substantial resale sales of the gift were made in the area within the last ninety (90) days) and, where applicable, the brand of the gift are clearly and conspicuously disclosed;

3. Soliciting consumers to attend sales presentations for one or more Festiva Products through promises of free vacations unless the vacations have no restrictions imposed before the vacation reservation can be made and do not require consumers to make any further payment to use the vacation, including any refundable deposit;

4. Soliciting time share owners to attend sales presentations for one or more Festiva Products at Festiva sales locations by misrepresenting the nature or purpose of the presentation, including, but not limited to, representing that the meetings are "educational," "informational," or words to that effect;

5. Soliciting Festiva members to attend a presentation for one or more Festiva Products where they will be solicited to purchase additional points without clearly disclosing that all or some part of the presentation will be a solicitation to purchase additional points or benefits in any Festiva Product;

6. Soliciting consumers to attend sales presentations for one or more Festiva Products by using fictitious names that imply or give the impression the solicitation is from a government agency or trade association, including, but not limited to, the Myrtle Beach Visitors' Information Bureau;

7. Informing consumers that they have won prizes or contests, including any language that has a tendency to lead the consumer to believe he or she has won a contest or anything of value, including but not limited to "congratulations," "you are entitled to receive," or words to that effect, unless (a) the consumer has been selected by a method in which no more than ten percent (10%) of the names considered are selected as winners of any prize, (b) the consumer is given the prize without any obligation, and (c) the prize is delivered to the consumer at no expense within ten (10) days of the representation of winning a prize;

8. Informing consumers that they are eligible to win a prize or words to that effect, unless each of the following is clearly and prominently disclosed immediately adjacent to the description of the item or price to which it relates: (a) the actual retail value of each item or prize (the price at which substantial sales of the item were made in the area within the last ninety (90) days, or if no substantial sales were made, the actual cost of the item or prize to the person on whose behalf the contest or promotion is conducted), (b) the actual number of each item or prize to be awarded, and (c) the odds of receiving each item or prize;

9. Representing to consumers that they have been specially selected by using language that has a tendency to lead a consumer to believe he or she has been specially selected, including but not limited to "carefully selected," "you have been chosen, "or words to that effect, unless (a) the selection process is designed to reach a particular type or particular types of consumer, (b) the selection process uses a source other than telephone directories, city directories, tax listings, voter registration records, purchased mailing lists, or similar common sources of names, and (c) no more than ten percent (10%) of those considered are selected;

10. "Packing" into the consumer's contract for any Festiva Product, or in any manner recouping, the costs of any item identified to consumers as a gift, prize, bonus, or free;

11. Representing to consumers that they will save money by purchasing any Festiva Product from defendant Festiva unless defendants can verify and substantiate these savings based on actual, verifiable, and documented past savings on contracts for any Festiva Product;

12. Representing during a sales presentation for one or more Festiva Products the availability of vacations at Festiva locations unless the consumer receives accurate availability and usage rates based on the time of year and size of the units for the past two calendar years prior to the date of the presentation;

13. Using the threat of increased maintenance dues and assessments to induce time share owners to convert their time share to membership in any Festiva Product;

14. Creating a false sense of urgency to purchase any Festiva Product by telling consumers that the offer presented at the sales presentation will not be available at any other time;

15. Failing to fully disclose in oral sales presentation for any Festiva Product and the sales contract all facts, figures, and assumptions relied upon by defendants in calculating the cost of the respective Festiva Product;

16. To the extent the total time spent in the sales presentation is greater than 150 minutes, defendants shall allow consumers to take all sales contracts and related paperwork off the premises for review, without requiring consumers to make any payment, to return within twenty-four hours;

17. To the extent that the total time spent in the sales presentation for a Festiva Product is less than 150 minutes, defendants shall provide consumers no less than one-half hour in a private space outside the presence of any of defendants' employees, agents, or representatives to review the sales contract and other relevant paperwork prior to signing; and

18. Charging usurious rates on financed contracts as defined by (insert state statute if applicable).

Defendants and their representatives, whether acting directly or through any other person, in connection with the advertising, marketing, promotion, offering for sale, or sale of any good or service, specifically including, but not limited to, vacation points, are hereby permanently restrained and enjoined from engaging in or causing or assisting other persons to engage in or cause, violations of any provision of the Telemarketing Sales Rule at 16 CFR, Part 310 (TSR), including, but not limited to, the following:

20. Misrepresenting, directly or by implication, any material fact, including but not limited to, the total costs to purchase, receive, or use, and the quantity of, the good or service, in violation of 16 CFR § 310.3(a)(2)(i);

21. Misrepresenting, directly or by implication, any material aspect of a prize promotion including, but not limited to, the odds of being able to receive a prize, the nature and value of a prize, or that a purchase or payment is required to win a prize or to participate in a prize promotion, in violation of 16 CFR §§ 310.3(a)(1)(iv), and 310.4(d)(iv);

22. Failing in any outbound telephone call to disclose truthfully, promptly, and in a clear and conspicuous manner (i) the identity of the seller; (ii) the nature of the goods or services; and (iii) that the purpose of the call is to sell goods and services, in violation of 16 CFR § 310.4(d);

23. Failing to keep, for a period of twenty-four (24) months from the date the record is produced, all (a) substantially different advertising, brochures, telemarketing scripts, and promotional materials; and (b) verifiable authorizations or records of express informed consent or express agreement required to be provided under the TSR.

(*See* Ex. A: Rybakoff Aff. and Ex. A thereto). The multistate group also ensured that Festiva understood that the term "Festiva Product" to include "any product sold, marketed, serviced or provided by any of the defendants or their employees, agents, representatives, successors, assigns, or subsidiaries, whether marketed under the Festiva name or otherwise, and shall include without limitation membership to the Festiva Adventure Club." (*See* Ex. A

to Ex. A, Email from Harriet Worley (North Carolina) to Edward Speas, Esquire and Joshua Durham, Esquire (Festiva's counsel). Notably, North Carolina alerted Festiva to the fact that while the document "was drafted for a North Carolina Court, [] each state would alter the format to meet its own state requirements with some being filed as AVC's rather than consent judgments." *Id.*

Courts have also held that if an investigative subpoena is defective, such defect can be cured in a variety of ways including a simple affidavit of enforcement counsel. *See, e.g.*, *Benson*, 703 P.2d at 1278-79.

Festiva's timeshare and FAC sales conduct has also come under considerable and continuous public scrutiny since at least 2006. *See, e.g.*, FOX 8, *FOX 8 Defenders: Lawsuit Filed Against National Travel Company*, (March 26, 2012), http://www.fox8live.com/Global/story.asp?S=17223701 (Ex. B); WGME CBS, *Festiva Investigated* (WGME 13: News on Your Side broadcast July 27, 2010), *available at* http://www.wgme.com/news/features/oys/stories/vid_193.shtml (Ex. C); ABC11 Investigates, *Paradise Lost? Timeshare Plan Under Scrutiny* (WTVD Raleigh-Durham, NC broadcast May 1, 2009), *available at* http://abclocal.go.com/wtvd/story? section=news /abc11_investigates&id=6789555 (Ex. D).

Festiva has significant Tennessee activity and has generated complaints from Tennessee consumers. Ex. A Rybakoff Aff.¶10 (over 1,000 consumer complaints have been lodged against Festiva in the Federal Trade Commission's complaint database), including complaints from Tennessee consumers. Festiva's business practices have also been the subject of government investigations and enforcement actions, *see State of Missouri, ex rel, Nixon v. Festiva Resorts, LLC*, No. 08AC-CC00509 (Mo. Cir. Ct. June 25, 2008) (Assurance

of Voluntary Compliance) (Ex. E) (Festiva agreed to cease seven specified deceptive practices, pay $324,393.70 in consumer restitution, $5,000 in civil penalties and $10,000 in costs and fees); North Carolina Investigative Demand issued to Festiva Resorts March 9, 2012 (Ex. F), and consumer litigation, *see* Amended Complaint, *Reeves v. Zealandia Holding Co.*, No. 6:13-cv-597-JA-TBS (M.D. Fla. June 11, 2013), ECF No. 42; Complaint, *Outer Banks Beach Club Assoc. v. Festiva Resorts Adventure Club Member's Assoc.*, No. 1:11-cv-246 (W.D. N.C. Sept. 22, 2011), ECF No. 1; Complaint, *Dwyer v. Festiva Resorts, LLC*, No. 2:11-cv-1985-MLCF-KWR (E.D. La. Aug. 12, 2011), ECF No. 2-1; Complaint, *Countryman v. Festiva Resorts, LLC*, No. 6:06-cv-3345-GAF (W.D. Mo. Sept. 1, 2006), ECF No. 1.

In sum, "[t]o require the state to substantiate its case before it may be allowed to investigate it would put the cart before the horse." *Kohn v. State*, 336 N.W. 292, 296 (Minn. 1983).

III. Festiva Misapprehends "Relevancy" As Used In Government Investigations

Festiva claims that the State's Requests "are in no way reasonably tailored to discover information relevant to violations of the TCPA . . . ." (Pet. 14). Festiva also mischaracterizes the Requests themselves and ignores the numerous accommodations the State attempted to make for Festiva in an attempt to secure its cooperation.

As an initial matter, the government's determination of relevance is entitled to great deference. *See, e.g., Tesoro Petroleum Corp. v. State*, 42 P.3d 531, 540-41 (Alaska 2002) ("Federal courts have shown deference to administrative agencies when reviewing administrative subpoenas . . . . The deferential approach to establishing relevance is sound.") (*citing In re Sealed Case*, 42 F.3d 1412, 1419 (D.C. Cir. 1994) and *In re Marwood*, 48 F.3d 969, 977 (6tth Cir. 1995)). Moreover, the government's own appraisal of relevancy must be

accepted by the court so long as it is not "obviously wrong." *FTC v Invention Submission Corp.*, 965 F.2d 1086, 1089 (D.C. Cir. 1992).

So long as the evidence sought by the subpoena was not plainly incompetent or irrelevant to any lawful purpose of the agency in the discharge of its official duties, the agency did not have to demonstrate that the information sought tended to prove a violation of the Act. *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501 (1943).

In order to determine whether an item is relevant, a reviewing court must compare the challenged request with the stated purpose of the inquiry. *Matter of Attorney General's Civil Investigative Demand*, 493 A.2d 972 (1985).

"In the administrative context, however, a much stronger showing of 'undue burden' is required.'" *FTC v. Boehringer Ingelheim Pharmaceuticals, Inc.*, 898 F. Supp.2d 171, 174 (D.D.C. 2012). "Some burden on subpoenaed parties is to be expected and is necessary in furtherance of the agency's legitimate inquiry and the public interest." *FTC v. Texaco, Inc.*, 555 F.2d 862, 882 (D.C. Cir. 1977)).

"The burden of proving undue hardship 'is not easily met where . . . the agency inquiry is pursuant to a lawful purpose and the requested documents are relevant to that purpose.'" *Linde Thomson Langworthy Kohn & Van Dyke, P.C. v. Resolution Trust Corp.*, 5 F.3d 1508, 1517 (D.C. Cir. 1993) (quoting *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950)). "[S]ome burden on the subpoenaed party is to be expected." *FTC v Church & Dwight Co.*, 747 F. Supp.2d 3, 8 (D.D.C. 2011). *See also FTC v. Texaco, Inc.*, 555 F.2d 862, 882 (D.C. Cir. 1977)). The leading case on the issues of relevance and burden, which really relate to the "reasonableness" of an investigative subpoena, is *United States v. Morton Salt Co.*, 338 U.S. 632 (1950). In *Morton Salt*, the Federal Trade Commission ("FTC") sought to compel Morton Salt and eighteen other salt producers to file reports

showing how they had complied with an earlier Seventh Circuit decree. The FTC order required the respondents to produce:

> a "complete statement" of the "prices, terms, and conditions of sale of salt, together with books or compilations of freight rates used in calculating delivered prices, price lists and price announcements distributed, published or employed in marketing salt from and after January 1, 1944.

Morton Salt, 338 U.S. at 637. Morton Salt advised the FTC in general terms that it had complied with the decree, but doubted the FTC's jurisdiction to require such a report and refused to comply. The FTC filed proceedings against Morton Salt to enforce its demand for the required statement and following summary judgment proceedings, the district court dismissed the case for want of jurisdiction. The Seventh Circuit affirmed the dismissal but the Supreme Court reversed, ruling that the FTC was entitled to demand the required statement.

The Supreme Court began its analysis by noting that "[t]his case illustrates the difference between the judicial function and the function the Commission is attempting to perform. *Morton Salt*, 338 U.S. at 641. Morton Salt argued that since the FTC had not made any specific "charge of violation," the FTC was engaging "in a mere 'fishing expedition' to see if it can turn up evidence of guilt." *Morton Salt*, 338 U.S. at 641. The Supreme Court rejected this argument pointing out that while courts had often disapproved of the "fishing expedition" argument in the *judicial* context, the argument carried no weight in the *administrative / investigative* context:

> We must not disguise the fact that sometimes, especially early in the history of the federal administrative tribunal, the courts were persuaded to engraft judicial limitations upon the administrative process. ***The courts could not go fishing, and so it followed neither could anyone else. Administrative investigations fell before the colorful and nostalgic slogan "no fishing expeditions."***

Morton Salt, 338 U.S. at 642 (emphasis added).[5] Notably, in a now often quoted passage, Justice Jackson observed:

> ***The only power that is involved here is the power to get information from those who can best give it and who are most interested in not doing so.*** Because judicial power is reluctant if not unable to summon evidence until it is shown to be relevant to issues in litigation, it does not follow that an administrative agency charged with seeing that the laws are enforced may not have and exercise powers of original inquiry. It has a power of inquisition, if one chooses to call it that, which is not derived from the judicial function. It is more analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.

Morton Salt, 338 U.S. at 642-43 (emphasis added). In *Windsor Towers*, the Tennessee Court of Appeals considered the standards for relevancy and broadness in the context of the State's consumer protection subpoena. Notably, the Court referred to Judge Cardozo's ruling in *In re Edge Ho Holding Co.*, 176 N.E.2d 537, 539 (1931) in quoting the district court as follows:

> Investigation will be paralyzed if arguments as to materiality of relevance, however appropriate at the hearing, are to be transferred upon a doubtful showing to the stage of a preliminary contest as to the obligation of the writ . . . Only where the futility of the process to uncover anything legitimate is inevitable or obvious must there be a halt upon the threshold.

Windsor Towers, slip op. at 9 (Ex. G). The Court similarly cited to *Scott v. Association to Childbirth at Home, International*, 430 N.E. 1012, 1021 (Ill. 1981) for the proposition that "In the case of an administrative investigation authorized by statute, relevance must be measured with reference to the statutory purpose, which defines the problem to be investigated." *Id.*

---

[5] Courts have cited to *Morton Salt* in pointing out that the "fishing expedition" slogan refers to an very outdated court sentiment toward investigative subpoenas seen in the early part of the 20tth Century. *See, e.g.*, *Mobil Oil Corp. v. Killian*, 301 A.2d 562, 567 (Conn. Super Ct. 1973) ("While Mobil has not used the phrase 'fishing expedition' in its thrusts at the subpoena, this constitutional attack clearly implies it. . . . [I]t now has little or no efficacy, as indicated in [*Morton Salt*], where the court rules that more recent views on this hackneyed phrase have been more tolerant of it than formerly under older decisions where civil administrative investigations are involved.")

Here, the State, not Festiva, is in the best position to know what is relevant to its investigation. Moreover, Festiva has not explained how or why the State's interrogatories are not relevant to its understanding "of the four areas of concern" it says Tennessee is investigating. None of the correspondence submitted by Festiva to the State explain this purported concern either. A review of the State's Requests indicate that many of them seek background information about Festiva (which has never been disclosed for the most part, let alone under oath). In sum, Festiva has failed to carry its burden of demonstrating the state's requests are not "relevant" to its investigation and this argument must fail.

Similarly, Festiva has failed to carry its burden regarding claims of burden. The respondent bears the burden of demonstrating that its business would be disrupted. *FTC v. Boehringer Ingelheim Pharmaceuticals, Inc.*, 898 F. Supp.2d 171, 175 (D.D.C. 2012). Notably, one court has explained:

> We emphasize that the' question is whether the demand is unduly burdensome or unreasonably broad. Some burden on subpoenaed parties is to be expected and is necessary in furtherance of the agency's legitimate inquiry and the public interest. The burden of showing that the request is unreasonable is on the subpoenaed party. Further, that burden is not easily met where, as here, the agency inquiry is pursuant to a lawful purpose and the requested documents are relevant to that purpose. Broadness alone is not sufficient justification to refuse enforcement of a subpoena. Thus, courts have refused to modify investigative subpoenas unless compliance threatens to unduly disrupt or seriously hinder normal operations of a business.

FTC v. Texaco, Inc., 555 F.2d 862, (D.C. Cir. 1977). Thus, the subpoenaed party must prove, through introduction of evidence, that compliance with the administrative subpoena is unduly burdensome. *FTC V. Standard Am., Inc.*, 306 F.2d 231 (3d Cir.1962). Here, Festiva has failed to make any such showing, relying instead on conclusory allegations of counsel regarding alleged hardships Festiva might face. Moreover, the State has offered to accommodate Festiva in every possible way, including travelling to its offices and reviewing

documents there, or even copying the data in electronic form and reviewing it that way. See August 7, 2013 Letter from Olha Rybakoff to Eli Richardson. (Pet. Ex. F.). In its response to the State, Festiva ignored the State's propositions. *See* Pet. Ex. I).

Thus, in *Genuine Parts Co.* v. FTC, 445 F.2d 1382 (5th Cir. 1971), a business was ordered to respond to a civil investigative demand notwithstanding the fact that the president testified that it would require 1500 man hours to respond to the unanswered questions. The court acknowledged that oppressiveness and burden are legitimate grounds for objection, (citing cases), but noted that the questions objected to went "to the very heart of the inquiry." The court concluded "when the degree of burdensomeness necessarily inherent in the preparation of a full response is considered in light of the pertinent responses the objected portions will produce, we are unable to hold that the burden of compliance is unreasonable."

Finally, it should be noted that broadness alone is not sufficient justification to refuse enforcement of a subpoena so long as the material sought is relevant. When a conspiracy is alleged, the search might take a broad sweep in order that information revealing the nature of the relationship between the co-conspirators can be obtained. *See also FTC v Texaco*, 555 F.2d at 882 ("Broadness alone is not sufficient justification to refuse enforcement of a subpoena.") (citing *Adams v. FTC*, 296 F.2d at 867). Indeed, courts have held that the FTC must be accorded "extreme breadth" in conducting its investigations. *See Genuine Parts v. FTC*, 445 F.2d at 1382 (citing *Morton Salt*, 338 U.S. at 652).

III. CONCLUSION

Festiva seems to forget that its ability to conduct business in this State is not a right; it is a privilege. As the Supreme Court observed in *Morton Salt*:

> [C]orporations can claim no equality with individuals in the enjoyment of a right to privacy. They are endowed with public attributes. They have a collective impact upon society, from which they derive the privilege of acting as artificial entities. The

> Federal Government allows them the privilege of engaging in interstate commerce. Favors from government often carry with them an enhanced measure of regulation.

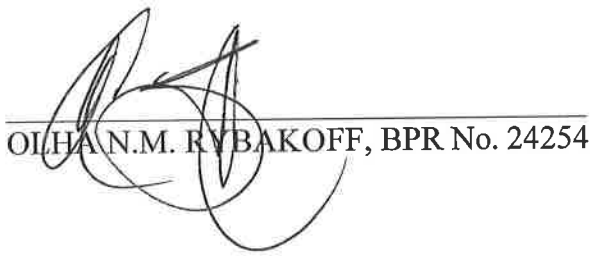
Morton Salt, 338 U.S. at 652. *See also Steele v. State*, 527 P.2d 585, 593 (Wash. 1975) (same). In order to enjoy the privilege of doing business in this State, Festiva must complies with the law and must submit itself to investigation where there is indication that Festiva has violated the law. Festiva has failed to carry its burden of showing there is "good cause" for a protective order and as such, its Petition must be denied and Festiva should be ordered to promptly and fully respond to the state's requests under oath.

Respectfully submitted,

Olha N.M. Rybakoff, BPR No. 24254
Senior Counsel
Jessica Myers, BPR No. 025595
Assistant Attorney General
Office of the Tennessee Attorney General
Consumer Advocate and Protection Div.
Post Office Box 20207
Nashville, TN 37202-0207
Phone: (615) 532-2590
Facsimile: (615) 532-2910
Email: Olha.Rybakoff@ag.tn.gov
E-mail: Jessica.Myers@ag.tn.gov

CERTIFICATE OF SERVICE

I, OLHA N.M. RYBAKOFF, hereby certify that on September 11, 2013, I caused a true and exact copy of the foregoing to be served upon Respondents by placing the same in the United States Mail, postage prepaid, addressed as follows:



OLHA N.M. RYBAKOFF, BPR No. 24254